Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22-177-86
PEH SWEE CHIN J
7 JULY 1990

Civil Law Act — Application of common law of England — Local circumstances — Registration of motor vehicles — Ownership claims — Fraudulent sale — Whether common law of England applicable — Civil Law Act 1956, s 3 — Road Traffic Ordinance 1958, ss 6 & 10

Road Traffic — Registration of motor vehicles — Ownership claim — Non-endorsement of ownership claim on registration card of vehicle — Effect of — Road Traffic Ordinance 1958, s 10

Sale of Goods — Title to goods — Fraud — Nemo dat rule — Vendor selling same goods twice to different purchasers — Estoppel by conduct — Whether first purchaser estopped from denying vendor's authority to sell goods a second time — Sale of Goods (Malay States) Ordinance 1957, ss 27 & 30

A leasing company (second plaintiff) had bought a tractor from a tractor dealer (the third defendant), and then leased it to the first plaintiff, a finance company. In the registration card, the dealer was stated to be the registered first owner, the leasing company is the second owner and the third owner was the finance company. The card carried an endorsement to the effect that the right of ownership was claimed by the leasing company.

Unknown to the plaintiffs, the dealer had earlier (in February 1984) sold the tractor to another finance company who then hired it to the second defendant pursuant to a hire-purchase agreement. The finance company purported to repossess the tractor following default by the second defendant in making the payments due under the agreement.

At the time that the finance company bought the tractor from the dealer, there was no registration card for the tractor. An application was made through the dealer for the issue of the registration card by the Registrar and Inspector of Motor Vehicles. The finance company also made a claim to ownership in the form of a letter sent to the dealer for registration with the registrar. The registration card was left with the dealer. Possession of the tractor too was left with the dealer.

The plaintiffs sued the defendants, seeking, inter alia, a declaration that all the defendants were 'not entitled' to the tractor.

Held, allowing the plaintiffs' application:

(1) The failure to carry out the practice of registering an ownership claim on the registration card would create the necessary expectation in the mind of a subsequent unknowing buyer of the vehicle or the necessary representation to him with regard to the status of the vehicle. Such consequence cannot be lost on any finance company acquiring a vehicle to have it let on hire to any hirer. It is inconceivable that it cannot be reasonably foreseen.

(2) All buyers of second-hand cars in West Malaysia have always depended on the absence of any registered endorsement of claim to ownership in the registration card as a 'green light' to deal with sellers whose names are registered as owners on the registration cards or their mercantile agents.

(3) The practice in West Malaysia combined with local statutory provisions in regard to the registration of ownership claims would constitute such a distinctive local circumstance of the inhabitants of West Malaysia that the decisions in English cases on the point of failure to have an ownership claim registered should not be followed.

[Bahasa Malaysia summary

Satu syarikat menyewa (plaintif kedua) telah membeli sebuah traktor daripada seorang penjual traktor (defendan ketiga), dan selepas itu menyewakannya kepada plaintif pertama, sebuah syarikat kewangan. Dalam kad pendaftaran, penjual itu telah dinyatakan sebagai pemilik pertama yang berdaftar, syarikat menyewa ialah pemilik kedua dan pemilik ketiga ialah syarikat kewangan itu. Kad itu mengandungi satu pengendorsan yang menyatakan bahawa hakmilik dituntut oleh syarikat menyewa itu.

Tanpa diketahui oleh plaintif-plaintif, penjual itu terlebih awal (dalam Februari 1984) telah menjual traktor itu kepada sebuah syarikat kewangan yang lain yang kemudiannya menyewakannya kepada defendan kedua di bawah satu perjanjian sewa-beli. Syarikat kewangan itu kononnya cuba memiliki balik traktor tersebut berikutan keingkaran defendan kedua membuat bayaran di bawah perjanjian itu.

Pada masa syarikat kewangan itu membeli traktor tersebut daripada penjual itu, tidak terdapat kad pendaftaran bagi traktor itu. Satu permohonan telah dibuat melalui penjual itu bagi pengeluaran kad pendaftaran oleh Pendaftar dan Inspektor Kenderaan Motor. Syarikat kewangan itu juga menuntut hakmilik dalam bentuk sepucuk surat yang dikirim kepada penjual itu bagi pendaftaran dengan pendaftar. Kad pendaftaran ditinggalkan dengan penjual itu. Pemilihan traktor itu juga ditinggalkan dalam tangan penjual itu.

Pihak plaintif mendakwa pihak defendan, menuntut, antara lain, satu deklarasi bahawa kesemua defendan tidak mempunyai hak ke atas traktor itu.

Diputuskan, meluluskan permohonan pihak plaintif:

(1) Kegagalan menjalankan amalan mendaftarkan sesuatu tuntutan hakmilik di atas kad pendaftaran akan melahirkan harapan yang perlu dalam fikiran seorang pembeli kenderaan itu yang terkemudian yang tidak tahu-menahu atau representasi yang perlu kepadanya tentang status kenderaan itu. Kesan sedemikian tidak boleh luput daripada pandangan mana-mana syarikat kewangan yang membeli sebuah kenderaan untuk disewa kepada mana-mana penyewa. Tidak mungkin yang ini tidak boleh diramal secara berpatutan.

(2) Semua pembeli kenderaan terpakai di Semenanjung Malaysia selalu bergantung kepada ketiadaan apa-apa pengendorsan berdaftar tentang tuntutan untuk hakmilik di atas kad pendaftaran sebagai 'lampu hijau' untuk membuat urusan dengan penjual yang namanya didaftar sebagai pemilik di atas kad pendaftaran atau ejen persaudagarannya (mercantile agent).

(3) Amalan di Semenanjung Malaysia bersama peruntukan statutori tempatan berkenaan pendaftaran tuntutan hakmilik merupakan keadaan tempatan yang begitu khas dan kerana itu kes-kes Inggeris tentang kegagalan mendaftarkan tuntutan hakmilik tidak patut diikuti.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-257-90.]

Cases referred to

1 *Moorgate Mercantile Co Ltd* v *Twitchings* [1977] AC 890 (not folld)
2 *United National Finance Ltd* v *Industrial Resources Ltd* [1986] 2 MLJ 481 (folld)

3 *Ng Ngat Siang* v *Arab-Malaysian Finance Bhd & Anor* [1988] 3 MLJ 319 (refd)
4 *Pacific Motor Auctions Pty Ltd* v *Motor Credits (Hire Finance) Ltd* [1965] AC 867 (refd)
5 *Tai Hing Cotton Mill Ltd* v *Lin Chong Hing Bank Ltd* [1986] AC 80 (refd)
6 *Public Textiles Bhd* v *LLN* [1976] 2 MLJ 58 (refd)
7 *Ong Lock Cho* v *Quek Shin & Sons Ltd* [1941] MLJ 88 (refd)
8 *Industrial Resources Bhd* v *United National Finance Ltd* (Civil Appeal No 2/86 in the Court of Appeal, Brunei Darussalam) (unreported) (not follld)
9 *London Joint Stock Bank Ltd* v *Macmillan & Arthur* [1918] AC 777 (refd)
10 *Bishopgate Motor Finance Corp Ltd* v *Transport Brakes Ltd* [1949] 1 KB 322 (refd)
11 *Donoghue* v *Stevenson* [1932] AC 562 (follld)
12 *Abigail* v *Lapin* [1934] AC 491 (refd)

Legislation referred to
Civil Law Act 1956 s 3
Road Traffic Ordinance 1958 ss 6(1), 10
Sale of Goods (Malay States) Ordinance 1957 ss 27, 29, 30, 30(1),
Road Traffic Regulations 1956 [Brunei] reg 47(1)

Abdul Rahim Noor (*Paul Subramamiam* with him) for the plaintiffs.
Lim Eng Hoe for the first defendant.

Cur Adv Vult

Peh Swee Chin J: In this case, I declined to follow an English decision of the highest authority, ie *Moorgate Mercantile Co Ltd* v *Twitchings*,[1] and other similar cases on a point which I considered, ought to be qualified, inter alia, by the local circumstances long prevailing in the states of West Malaysia, and in doing so, I followed practically the judgment of the High Court of Brunei Darussalam in *United National Finance Ltd* v *Industrial Resources Ltd*,[2] even though it was reversed by the Court of Appeal of Brunei Darussalam.

The facts of the instant case which are common enough, were briefly as follows:

The second plaintiff, viz Supreme Leasing Sdn Bhd (hereafter called 'Supreme'), in order to lease a reconditioned tractor used for moving earth to the first plaintiff (hereafter called 'the lessee'), bought one from the third defendant (hereafter called 'the tractor dealer'), (and the tractor so bought is hereafter called 'the Caterpillar'). The leasing agreement was signed on 18 July 1984, for a period of 25 months commencing from this date at the monthly rent of $7,838 payable by the lessee to Supreme which had bought it from the tractor dealer for $165,000.

The original registration book or card (P2) of the Caterpillar was produced in court by Supreme. It had the words in Bahasa Malaysia, viz 'Imported used vehicle'. Both parties at the trial referred to it as an imported reconditioned vehicle. It had eight rectangles or spaces, to provide for registration of names and addresses for owners in case of changes of ownership. Such a registration card is familiar to all car owners. The registered first owner was the tractor dealer, the second owner, Supreme, and the third or last owner, the lessee. In the case of one of the empty spaces under the heading of 'For use of Road Transport Office only', was an endorsement or memorial with the words, viz 'Right of ownership is claimed by Supreme Leasing Sdn Bhd' with the usual imprint of the rubber seal of Road Transport Department, Johore. I will have more to say about the registration book.

The Caterpillar was on 10 February 1986 'repossessed' or seized by the first defendant called the UMBC Finance Bhd, its former name being United National Finance Bhd (hereafter called 'the UMBCF'). Police reports were lodged by Supreme and the third plaintiff, and this action was subsequently filed. UMBCF through its officer, stated that it bought the Caterpillar from the same person, ie the tractor dealer for a sum of $130,000 on 25 February 1984, in order to enter into a hire-purchase agreement dated 25 February 1984, with the second defendant (hereafter called 'the hirer'), for total purchase price of $206,199.34 payable by monthly rental of $199.84 for 54 months. When the hirer fell into arrears of rent for part of January 1986 and thereafter, UMBCF began to look for the hirer who seemed to have defied any attempt by UMBCF to trace him. It did manage to trace the missing Caterpillar and repossessed it at Kampar. So far, all the facts stated were really not disputed. DW1, an officer of UMBCF, in charge of hire-purchase transactions, gave further evidence as follows.

He deposed to the effect that since 1982, UMBCF had been dealing with the tractor dealer in respect of hire-purchase transactions involving about $3m to $4m. He said UMBCF applied through the tractor dealer for the issue of registration book or card in respect of the Caterpillar, but in almost the same breath, he said it was the hirer who so applied instead. The claim to ownership was made in the form of a letter sent to the tractor dealer for registration with the Registrar and Inspector of Motor Vehicles (hereafter called 'the RIMV'). It normally took two to six months for the RIMV to issue the registration card. UMBCF did not know the intention of the tractor dealer to resell the Caterpillar to Supreme, and when it heard of the claim of Supreme, he said, the tractor dealer or its directors could not be traced by then and further its office was found to have been closed. He said further that UMBCF did not authorize the hirer or the tractor dealer to sell the Caterpillar.

In cross-examination, DW1 said neither UMBCF nor he had checked with the RIMV as to whether the Caterpillar was registered with the RIMV or not. He said further, that after six months, UMBCF checked with the tractor dealer verbally only. He disagreed that UMBCF or its officer did not take any steps during the said two to six

months to ascertain if the Caterpillar had been registered. When asked if UMBCF had been negligent, he said he was unable to comment on it.

References to having the Caterpillar registered, in the evidence of DW1, must have been references to having the name of the hirer registered as an owner, and the claim to ownership of the Caterpillar by UMBCF registered by RIMV.

Both the hirer (second defendant) and tractor dealer (third defendant) did not appear and were not represented by counsel.

It was submitted by learned counsel for Supreme and the lessee that UMBCF had conducted itself in such manner as to clothe the tractor dealer with such authority to dispose of this Caterpillar to Supreme and to give good title to Supreme. Section 27 of the Sale of Goods Act (Malay States) Ordinance 1957 (hereafter called 'the Act') was cited in support and it could not be disputed that his clients had acted in good faith without notice of UMBCF's interest in the tractor.

It was submitted that the tractor dealer was the dealer of the Caterpillar and dealt with it in the ordinary course of business and entered into contracts in respect of it, and the tractor dealer was a mercantile agent.

It was further submitted that though consent was not given to the tractor dealer, UMBCF had put in the hands of the tractor dealer the registration card, and possession of the Caterpillar when Supreme acquired it. The lessee's employee (PW2) saw it at the premises of the tractor dealer. A couple of things could have been done to prevent a resale by the tractor dealer, it was submitted; the first was that UMBCF could have sent a notice to the tractor dealer asking the latter to explain for the delay in the registration, and if the explanation was not satisfactory, a report should have been lodged with the RIMV of the purported claim. However, what UMBCF did was merely to leave everything in the hands of the tractor dealer and this clothed the tractor dealer with authority without any reservation of any kind. This conduct precluded the UMBCF from denying the authority of the tractor dealer to sell the Caterpillar to Supreme and s 27 aforesaid therefore applied.

Next, it was submitted by learned counsel for the lessee and Supreme that s 30(1) of the Act applied. He cited *Ng Ngat Siang* v *Arab-Malaysian Finance Bhd & Anor*[3] in support. It was submitted that UMBCF had left the registration card with the tractor dealer, and the Caterpillar was in possession of the tractor dealer, who delivered the Caterpillar and there was no question of mala fides on the part of the lessee or Supreme. He cited an English case *Pacific Motor Auctions Pty Ltd* v *Motor Credits (Hire Finance) Ltd*[4] to say that lack of legal title did not matter to Supreme if there was continuity of physical possession of the Caterpillar by the tractor dealer for the purpose of s 30(1) of the said Act. The continuity in possession commenced from the time UMBCF left the Caterpillar in the possession of the tractor dealer until Supreme took possession of it. Here the hirer took possession of the Caterpillar from UMBCF but there was no evidence of physical delivery to the hirer by the tractor dealer.

In reply learned counsel for UMBCF submitted that in regard to s 30(1) of the said Act, there was no evidence of continuity of possession. It was not pleaded that the Caterpillar was, from February 1984 when UMBCF bought it up to the time of delivery in July 1984 to Supreme, in the possession of the tractor dealer. It was pointed out that D13, an acknowledgment of the delivery of the Caterpillar by the tractor dealer to the hirer and addressed to the UMBCF, was evidence of physical delivery to the hirer. It was further pointed out that PW3, an officer of Supreme, had told the court that he did not know where the Caterpillar was, prior to 18 June 1984 when Supreme paid the price to the tractor dealer for the Caterpillar. The plaintiffs had therefore failed to prove the continuity of possession for there was a break in such possession of the Caterpillar, as evidenced by D13, when the tractor dealer delivered the Caterpillar to the hirer. The *Pacific Motor Auctions Pty Ltd* case[4] had interpreted s 30(1). Section 30(1) therefore did not apply to the instant case.

On the question of s 27 of the Act, ie as regards estoppel by negligence, there was no evidence in this case, that either UMBCF consented to the tractor dealer, or gave authority to the latter to sell the Caterpillar to Supreme. There must be some conduct. Here, learned counsel submitted that the conduct in question was the failure by UMBCF to have the ownership claim endorsed on the registration card and to leave the matter in the hands of the tractor dealer, and his answer to this was that such failure did not amount to such conduct unless there was a legal duty to get the ownership claim endorsed. He cited *Tai Hing Cotton Mill Ltd* v *Lin Chong Hing Bank Ltd*[5] and *Public Textiles Bhd* v *LLN*.[6] There must be a representation and there must be a duty to act. Counsel also cited *Ong Lock Cho* v *Quek Shin & Sons Ltd*.[7]

Learned counsel submitted that there was no duty on the part of UMBCF to inform the rest of the world of its interest in the Caterpillar by putting the endorsement of its ownership claims on its registration card. Further, the failure in fact did not mislead Supreme into buying the Caterpillar. There was no duty to put in such an endorsement and *Moorgate Mercantile Co Ltd* v *Twitchings*[1] was relied on, and counsel gave a summary of the facts in that case.

It was further submitted that UMBCF was careless as to itself, and it owed no duty of care to others and there was no system of registration in Malaysia. There was no obli-

gation for the RIMV to have an ownership claim endorsed on the registration card, but merely an ad hoc facility to finance companies, but without statutory provisions. Section 6(1) of the Road Traffic Ordinance 1958 (which applied to this instant case, though since repealed) was cited, that the legal or actual owner was at the mercy of the hirer. These was no section dealing with such endorsement.

Learned counsel further cited the judgment of Court of Appeal of Brunei Darussalam in Civil Appeal No 2/86, viz *Industrial Resources Bhd* v *United National Finance Ltd*[8] (being an appeal from the judgment in *United National Finance Ltd* v *Industrial Resources Ltd*[2] in which Roberts CJ sat in the High Court as a judge of first instance, and which was reversed).

Further, it was submitted that there was no duty of care of a person to take precaution in the management of his own business, and *London Joint Stock Bank Ltd* v *Macmillan and Arthur*[9] was cited.

Further it was submitted that the negligence must be the proximate cause of the damage, thus as in *Tai Hing*'s case,[5] the negligence must be in the transaction itself, ie the forged cheque. Further even if there was a duty, there was no possibility of a representation because Supreme did not rely on the registration book, thus PW3, an officer then at the Supreme, only saw for the first time the registration card when the present action was filed. He did not have the information nor did he know if the search was made. It was lastly submitted that there must be the causation point, ie negligence must be the proximate cause of the damage. The decision of the Court of Appeal of Brunei Darussalam[8] was again cited and relied on.

At the end of submission, I gave judgment for the plaintiffs as prayed against the defendants and costs, the judgment including of course, 'a declaration that all defendants are not entitled to the equipment', 'equipment' being the reference to the Caterpillar referred to in the judgment.

I now deal with the core of my grounds of decision. Both UMBCF and Supreme were of course genuine purchasers and the villain of the piece was undoubtedly the tractor dealer who sold the Caterpillar twice fraudulently.

Very significantly, s 27 of the Act fell for consideration by the court. Section 27 sets out as follows:

> Subject to the provisions of this Ordinance and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell;
>
> Provided that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

As is well known, s 27 reiterates the common law rule of nemo dat quod non habet, the foundation of the law of sale of goods. As was observed very aptly by Lord Denning in *Bishopgate Motor Finance Corp Ltd* v *Transport Brakes Ltd*[10] at p 336, in which his Lordship said:

> In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title.

The second principle referred to must obviously refer to exceptions to the said common law rule or to s 27 as found in other sections of the Act, such as ss 30, 29 and others. It will be apparent that s 27 itself contains two exceptions, one of which will be explained in detail later, ie that on account of the conduct of the owner (the real owner), he is precluded from denying the seller's authority to sell. This exception and s 30(1) of the Act were the issues actively canvassed in this case. I shall deal with s 30(1) first.

Section 30(1) sets out as follows:

> Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

The important part of s 30(1) for the purpose of this case is '... having sold goods, continues or is in possession of the goods ...'. The word 'possession' therein, has been interpreted by the Privy Council in the *Pacific Motor Auctions* case[4] to mean continuous physical possession without a break after the sale of goods and up to the time of another or subsequent sale. Here D13 proved that there was such a break in the possession of the Caterpillar by showing the tractor dealer to have delivered the Caterpillar to the hirer to whom the Caterpillar was let on hire by UMBCF. The claim on the ground of s 30(1) therefore failed.

On the ground of s 27, from the evidence, and submissions, there could be no doubt that Supreme had relied on estoppel by conduct or more specifically, by negligence, of UMBCF thereby precluding the latter from denying the tractor dealer's authority to sell the Caterpillar to Supreme.

Estoppel is of three kinds, viz by record, by deed and by conduct. Estoppel by conduct can be subdivided, in

some overlapping way, into estoppel by representation and by negligence. Estoppel by negligence was, from the evidence and submission, more relevant in this case. Professor Sir Rupert Cross, in his *Evidence* (4th Ed) at p 304 says:

> There is, however, a type of estoppel, often called estoppel by negligence, in which the party in whose favour it operates is the victim of the fraud of some third person facilitated by the careless breach of duty of the other party. An example is provided by *Coventry, Shepherd & Co* v *Great Eastern Rail Co* [(1883) 11 QBD 776]. In that case the defendants carelessly issued two delivery orders relating to the same consignment of goods, thus enabling the person to whom they were issued to obtain an advance from the plaintiff, and the defendants were held to be estopped as against him from denying the fact that the goods mentioned in the order were held on behalf of the assignor. Someone who puts documents of this nature into circulation owes a duty to those into whose hands they may come.

The estoppel by negligence in this case was alleged to be the failure of UMBCF to take any steps for six months to ensure that UMBCF's claim to ownership to the Caterpillar was registered or endorsed by the RIMV on the registration card of the Caterpillar. In this connection, the tractor dealer sold it to UMBCF in February 1984 and again sold it to Supreme in July 1984. I mention this allegation so that the same could continue to be borne in mind in reading what I have to say further.

The registration of claim to ownership by finance companies differs very significantly between the United Kingdom and West Malaysia.

In England, there is the total absence of any statutory provision, or any facility given by any government department dealing with registration and licensing of vehicles for the registration and or endorsement of such claim to ownership. Instead, it is believed that there is some sort of private arrangement among the finance companies themselves like what is stated in the reported case of *Moorgate Mercantile Co Ltd*[1] in which there was a kind of private register for all hire-purchase transactions kept by a company set up as some sort of trade association of the finance companies called Hire-Purchase Information Ltd, to which all members of the company had their hire-purchase transactions recorded there for the common benefit of all.

Further in that case, one McLorg obtained possession of a car from Moorgate on hire purchase, and there was a failure by Moorgate to register the hire-purchase agreement with Hire-Purchase Information Ltd. McLorg offered to sell to a dealer called Twitchings who bought it after finding no record of any prior hire-purchase transaction in the files of Hire-Purchase Information Ltd. Twitchings resold the car and on discovering the sale to Twitchings, Moorgate sued Twitchings for damages for conversion. The defence was estoppel by negligence in the failure of Moorgate to have the prior hire-purchase agreement with McLorg registered with the Hire-Purchase Information Ltd. The claim found its way to the House of Lords where five learned Law Lords by a majority of one, ie by three to two majority, allowed the claim of Moorgate. The facts in that case are similar to the facts in the instant case and also those in the *United National Finance Ltd* v *Industrial Resources Ltd.*[2]

In the *Industrial Resources Ltd* case,[2] Industrial bought a BMW from a dealer and let it on hire-purchase to one Martin by a hire-purchase agreement on 19 August 1983. Though Martin's name was subsequently registered on the registration card as owner but there was a failure to register the claim by Industrial to ownership of the BMW on the registration card. Industrial had merely sent an employer to see if the registration card was ready for collection. Martin fraudulently obtained a loan of $30,000 from United Finance in the form of sale by Martin to United Finance and reletting by United Finance to Martin with United Finance's ownership claim recorded this time in the registration card by the vehicle registering authority. Industrial repossessed the car on Martin's default of payment of instalments. United Finance then sued Industrial for a declaration that the BMW was its property. Roberts CJ held to the effect that Industrial was estopped by its own negligence in failing to register earlier a ownership claim on the registration card and his Lordship distinguished the facts there from the case of *Moorgate*,[1] by referring to Brunei's Road Traffic Regulations 1956, reg 47(1) which is set out below:

> Where the person entitled to the possession of a motor vehicle or trailer is not the absolute owner thereof, but is registered as the owner thereof, any person claiming to be the absolute owner thereof (hereinafter called 'the claimant') may apply to the licensing officer of the district in which the vehicle or trailer is registered to enter his name in the register as the absolute owner in addition to the name of the registered owner.

The learned judge further held: 'Thus I find that in Brunei, by reason of the different legislation and practice in force for 30 years, there is a duty which differs from that which exists in England, namely, to take reasonable steps to register a claim to ownership of a motor vehicle.' He gave judgment to United Finance against Industrial.

On appeal, the Court of Appeal of Brunei Darussalam reversed the judgment of Roberts CJ and dismissed the claim of the United Finance instead. After a review of various English cases including the *Moorgate* case,[1] it held to the effect that the failure to register in that case, the ownership claim would not amount to estoppel by negligence, unless there was a legal duty to do so and not a mere social or moral duty, or a 'long usage resulting from a misunderstanding of the intended effect of reg 47(1) of the Brunei's Road Traffic Regulations 1956.

Reverting back to the difference between United Kingdom and West Malaysia on the question of the

registration of the ownership claim, the registration system would appear to be some sort of private arrangement among the finance companies as described in the *Moorgate* case[1] in the United Kingdom. In West Malaysia, however, it is a statutory system or at least a quasi-statutory system.

Our law recognizes because of hire-purchase or leasing transactions, that more than one party can claim to be owner of a motor car. One who is entitled to possession or immediate possession is entitled to be registered as owner and such 'owner' is liable to the authorities for carrying out all provisions of road traffic or road transport legislation, viz in the instant case, the Road Traffic Ordinance 1958 (since repealed). However, s 10(2)(a) and s 10(3) of this Ordinance had a crucial role to play in this case.

Section 10(2)(a) and (3) are set out below:

> 10(2) Where 2 or more persons have or claim possession and use of a motor vehicle, the Registrar shall register as the owner of the motor vehicle —
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> (a) such one of those persons as may be nominated by them in the prescribed manner for the purpose of such registration; or
>
> (b) ...
>
> (3) In any case referred to in paragraph (a) of subsection (2) of this section the Registrar may also enter in the register and in the registration book the names of the other claimants to the ownership of the motor vehicle, but no such entry of the name of any claimant shall be deemed to affect any liability which the person registered as owner may incur under any of the provisions of this Ordinance or any rules made thereunder, or to vest in such claimant any of the rights or powers conferred by this Ordinance on the registered owner of a motor vehicle.

The above statutory provisions did not apparently find their counterpart in the United Kingdom's Road Traffic Act.

I found myself in entire agreement with the conclusion of Roberts CJ in the *Industrial Resources* case,[2] when he found estoppel by negligence by relying on Brunei's Road Traffic Regulations in question and the practice there for 30 years in question. I would not follow the decision of Brunei Darussalam's Court of Appeal in this regard for the reasons to be given below.

First, their Lordships seemed to hold that the Road Traffic Regulations in question did not create a legal duty of care as opposed to a 'social and moral duty'. The House of Lords in *Donoghue* v *Stevenson*[11] has made it abundantly clear in my opinion, that if any person can reasonably foresee that his act or omission is likely to cause damage or injury to any other person, he should take steps or precaution to avoid such act or omission, (the snail in the ginger ale's bottle in that case being just an example;), no question of statutorily created duty of care need pre-exist.

The failure to carry out the practice of registering an ownership claim on the registration card would create the necessary expectation in the mind of a subsequent unknowing buyer of the car, or the necessary representation to him with regard to the status of the car. Such consequence cannot be lost on the mind of any finance company acquiring a car to have it let on hire to any hirer. It is inconceivable that it cannot be reasonably foreseen.

I would like to express my opinion on the 'practice for 30 years' in Brunei alluded to by Brunei Darussalam's High Court and disregarded by its Court of Appeal, suggesting, I believe, that such practice was 'a long usage resulting from a misunderstanding of the intended effect of reg 47(1)'.

Since 1958, ie the coming into force of the Road Traffic Ordinance 1958 at any rate, if not since the end of the Second World War, all buyers of second-hand cars in West Malaysia have always depended on the absence of any registered endorsement of claim of ownership in the registration card as a green light to deal with sellers whose names are registered as owners on the registration cards or their mercantile agents. By and large, a great deal of fraudulent 'double-selling' has been avoided. All such buyers have come to regard the absence of registration or endorsement of claim to ownership as showing a car to be free from any hire-purchase liability. This practice, of course, has been assisted no doubt by the system of registering the same made available by the RIMV in each state in West Malaysia based no doubt on the statutory provisions, such as s 10(2)(a) and s 10(3) of the Ordinance. It is interesting to note that s 10(2)(a) and s 10(3) have been re-enacted and continued in the Road Transport Act 1987 which replaced the Ordinance.

Now under our Civil Law Act 1956, s 3(1)(a) and (2) provide as follows:

> 3 (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
>
> ...
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

I ought to emphasize the proviso to s 3(1)(a). I concluded that the practice in West Malaysia described above, com-

bined with the statutory provisions of the Road Traffic Ordinance 1958 in regard to the registration of ownership claim, would constitute such a distinctive local circumstance of the local inhabitants of West Malaysia that the decision of *Moorgate*[1] and other cases directly and indirectly on the point of failure to have an ownership claim registered should not be followed. We have to develop our own common law just like what Australia has been doing by directing our minds to the 'local circumstances' or 'local inhabitants'.

It remains for me to deal with certain connected specific points raised; out of deference to rather elaborate arguments on them, with which I was unable to agree however.

Learned counsel for Supreme submitted with reference to the proviso to s 27 of the Act, and learned counsel for UMBCF did not deem it fit to reply thereto, quite rightly in my opinion. It was submitted that the tractor dealer, being a mercantile agent, thus sold the Caterpillar and I suppose, validly. Bearing the words of the proviso in mind, it was never the case and there never was the evidence that the Caterpillar was in the first place left with the tractor dealer with the consent of UMBCF.

Learned counsel for UMBCF raised the point to the effect that his client's negligence, was not the proximate cause of the damage. (Please refer to his submission quoted above.) In my view, the damage, of course, should refer to the adverse claim of UMBCF against Supreme and the subsequent seizure of the Caterpillar. It would not be wrong to say that if there was an ownership claim registered or endorsed on the registration card, the tractor dealer would not have the gall or the legalistic cover to carry into effect a well-concealed fraud, for to do so in the face of the endorsement would result in an arrest and prosecution of its officers concerned, with the police not requiring at all any lengthy investigation. It is interesting to observe by way of comparison that in *Abigail* v *Lapin*,[12] a land case on appeal from Australia with which we all are familiar, the failure of Abigail to make a search for any caveat which Lapin in fact failed to lodge, did not stop their Lordships in the Privy Council when giving judgment for Abigail, from holding that the Lapins had neglected 'the well-known method of protecting their rights and interests by means of a caveat'.

For the reasons given above, the court gave judgment to Supreme (second plaintiff) and other persons claiming through it, viz the other plaintiffs with costs. The only regret the court had was having to give judgment against counsel who had prepared his case so exceptionally well.

Claim allowed.

Solicitors: *Maxwell Kenion Cowdy & Jones; Mah-Kok & Din.*

Reported by *PS Ranjan*

Hong Leong Finance Co Bhd lwn Lee Geng dan Satu Yang Lain

MAHKAMAH TINGGI (KUALA LUMPUR) — GUAMAN NO C7360 TAHUN 1985
ZAKARIA YATIM H
22 JUN 1990

Acara Sivil — Perintah pengkomitan — Penghinaan terhadap mahkamah — Perintah menghendaki defendan memberi maklumat mengenai 'whereabouts of documents, goods and accessories' — Perintah mempunyai maksud yang luas — Prinsip-prinsip undang-undang berkenaan dengan perintah pengkomitan — Kaedah-Kaedah Mahkamah Tinggi 1980, A 52 k 5(3)

Ini adalah satu permohonan daripada pihak plaintif memohon mahkamah membuat perintah supaya defendan pertama dikomitkan ke penjara sivil oleh kerana defendan pertama telah melakukan penghinaan terhadap mahkamah dengan melanggar perintah mahkamah. Defendan pertama telah diperintahkan oleh mahkamah untuk memberitahu pihak plaintif 'the whereabouts of the documents, goods and accessories mentioned below'. Defendan pertama telah menulis surat kepada peguam pihak plaintif yang menyatakan di mana terletaknya jentera-jentera dan dokumen sebagaimana yang diminta oleh pihak plaintif.

Diputuskan, menolak permohonan itu:

(1) Surat yang ditulis oleh defendan pertama telah pun mematuhi perintah mahkamah. Perintah itu hanya menghendaki defendan pertama memberi maklumat mengenai 'the whereabouts of the documents, goods and accessories'.

(2) Perkataan 'whereabouts' harus diberi makna yang biasa digunakan, yang terdapat dalam kamus. Disebabkan penggunaan perkataan 'whereabouts' dalam perintah tersebut, perintah itu tidak mengarahkan defendan pertama memberi maklumat dan tempat yang tepat. Perkataan yang digunakan dalam perintah itu luas maknanya dan kurang tepat.

(3) Perintah pengkomitan akan dibuat hanya kalau perintah mahkamah itu jelas dan tidak mempunyai makna yang kabur (clear and unambiguous). Perintah dalam kes ini adalah sah dan jelas tetapi terlalu luas maknanya.

[English summary

This is an application by the plaintiffs for an order of committal to commit the first defendant to prison for contempt of court. The first defendant had been ordered by an order of court to inform the plaintiffs of 'the whereabouts of the documents, goods and accessories mentioned below' and the plaintiffs allege that the first defendant had failed to comply with the order. The first defendant had sent a registered letter to the plaintiffs' solicitors stating where the machinery and douments are located.

Held, dismissing the application:

(1) The letter that had been written by the first defendant had complied with the order of court. The order had only directed the first defendant to give information on the 'whereabouts' of the documents and goods.

(2) The word 'whereabouts' should be given its plain and ordinary dictionary meaning — 'at what approximate location or place' or 'person's or thing's location roughly defined ...'. Because of the use of the word 'whereabouts', the order did not require the first defendant to give the precise location of the